No. 17-130

IN THE

# Supreme Court of the United States

RAYMOND J. LUCIA COMPANIES, INC. AND RAYMOND J. LUCIA,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICUS CURIAE OF FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE IN SUPPORT OF NEITHER PARTY

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February 26, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## STATEMENT OF INTEREST[1]

This brief is presented on behalf of the Federal Administrative Law Judges Conference (FALJC). FALJC is a voluntary professional association founded in 1947 that represents and serves administrative law judges (ALJs) employed throughout the federal government. The government employs more than 1930 ALJs in more than 30 agencies to adjudicate a wide variety of cases. Appendix A.[2]

FALJC membership includes ALJs from virtually every Federal agency that appoints ALJs. Appendix B (FALJC Mission and Leadership). A primary FALJC mission is to promote due process and impartiality in administrative procedure through maintenance of ALJ decisional independence under the Administrative Procedure Act, (APA) Pub. L. No. 79-404, 60 Stat. 237 (1946), codified at 5 U.S.C. §§ 551-559. Appendix B.

This Court granted certiorari on the question of whether ALJs of the Securities and Exchange Commission (SEC) are officers of the United States within

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[1] The parties have consented to the filing of this amicus brief. No person other than the Federal Administrative Law Judges Conference and its counsel have authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

[2] ALJs adjudicate cases involving, among other things, advertising, antitrust, banking, communications, energy, environmental protection, food and drugs, health and safety, housing, interstate commerce including the United States Mail, international trade, labor management relations, securities and commodities markets, transportation, social security disability, Medicare, and other benefits claims.

the meaning of the Appointments Clause.[3] This issue has been raised regarding ALJs at other agencies and this decision will impact other agencies.[4] FALJC takes no position on the question of whether ALJs are officers.[5]

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[3] *Lucia v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017), *cert. granted*, 2018 WL 386565 (U.S. Jan. 12, 2018) (No. 17-130). The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] Some ALJ members have been appointed by heads of agencies, some have had previous appointments ratified by the agency head, and some are appointed by an official that is not the head of a department or commission. All ALJs, however, were deemed qualified after an extensive examination process conducted by the Office of Personnel Management (OPM).

[5] Petitioner contends that administrative proceedings conducted by SEC administrative law judges are invalid because they are inferior officers under the Constitution and were not properly appointed as required by the Appointments Clause of the U.S. Constitution. Respondent agrees. The ruling en banc below split 5-5, rejected Petitioner's argument and followed D.C. Circuit precedent based on final decision-making authority. *See Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000). In contrast, the Tenth Circuit in *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016) held that the SEC ALJs are inferior officers based on this Court's analysis that was applied to Special Trial Judges of the Tax Court in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). The majority ruling in *Bandimere* goes no further than

Resolution of the question presented is important to FALJC, however, for three principal reasons: to preserve ALJ decisional independence created by Congress in the APA; to clarify the remedy for an unconstitutional appointment process on final, pending, and prospective administrative adjudications throughout the federal government; and, to ensure that ratification of incumbent ALJs is sufficient under the Appointments Clause to permit ALJs to adjudicate existing and future disputes consistent with the Constitution.

## SUMMARY OF ARGUMENT

Congress enacted the APA and created the ALJ position to provide for due process in administrative adjudication. The APA ensures due process through ALJ selection, appointment, protections, and independence.

The resolution of this proceeding should preserve ALJ decisional independence created by Congress in the APA, provide clear guidelines regarding the ratification or appointment of ALJs and the review of pending cases by properly-appointed ALJs, and insure that ratification of incumbent ALJs is sufficient under the Appointments Clause to permit ALJs to adjudicate existing and future disputes consistent with the Constitution.

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finding that SEC ALJs are inferior officers who were not appointed pursuant to Article II of the Constitution. It is noteworthy that the concurring opinion by Judge Briscoe and the dissent by Judge McKay address the potential impact of the majority ruling on administrative proceedings conducted by ALJs.

## ARGUMENT

### I. CONGRESS ENACTED THE APA AND CREATED THE ALJ POSITION TO PROVIDE FOR OPEN AND FAIR DUE PROCESS IN ADMINISTRATIVE ADJUDICATION FOR THE BENEFIT OF THE PUBLIC

Congress expressly enacted the APA "to improve the administration of justice by prescribing fair administrative procedure." Pub. L. No. 79-404, 60 Stat. 237 (1946). "The ALJ position was created by the Administrative Procedure Act (APA) to ensure fairness in administrative proceedings before Federal government agencies. ALJs have two primary duties which are 1) presiding over agency hearings, taking evidence, and acting as a preliminary fact finder in proceedings, and 2) making an initial determination about the resolution of a dispute." *See* Statement of Joseph Kennedy, Associate Director of Human Resources Solutions, U.S. Office of Personnel Management, *Examining Due Process in Administrative Hearings*, Hearing before the Subcomm. on Regulatory Affairs and Federal Management, U.S. Senate Comm. on Homeland Security and Governmental Affairs, 114th Cong., 2d Sess. (May 12, 2016).

To achieve this goal, the APA contains several essential prescriptions. The APA requires agencies to keep the public currently informed of agency organization, procedures, and rules. It provides for public participation in the rulemaking process. It prescribes uniform standards for the conduct of formal rulemaking and adjudicatory proceedings which are required by statute to be made on the record. It restates the law governing judicial review. Finally, the APA provides protection for the independence and status of

examiners to be used by agencies in the conduct of hearings. Ralph F. Fuchs, *The Attorney General's Manual on the Administrative Procedure Act*; *The Federal Administrative Procedure Act and the Administrative Agencies*, 23 Ind. L.J. 364 (1948). A hearing examiner is now called an Administrative Law Judge. *See* Sections 5 and 11 of the APA; U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 54-56, 72 (1947).

Prior to the APA, federal administrative agencies designated trial examiners to preside over hearings for the reception of evidence, but the examiners' tenure, status, compensation, and promotions were dependent on agency ratings under the Classification Act of 1923, as amended. *See Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 130 (1953). This regulatory system engendered many complaints that the trial examiners "were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Id.* Therefore, after extensive executive branch committee studies and reports and congressional hearings, Congress included Section 11 in the APA for the purpose of rendering trial examiners independent and secure in their tenure and compensation. *Id.* at 130 and n.2 (citing Administrative Procedure Act—Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., p. 215 (1946)). Section 11 of the APA provided that "[e]xaminers shall be removable by the agency in which they are employed only for good cause" and their "compensation is provided independent of the agency recommendations or ratings." *Id.*

This brief history demonstrates that Congress created the ALJ position under section 5 U.S.C. § 553(b)(3) of the APA to enhance procedural fairness and due process in administrative proceedings before federal agencies by allowing an impartial decision maker to preside over the reception of evidence at agency hearings. The task of a court in determining validity of a congressional enactment is not to destroy the act, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 466 (1989).

Congress provided that "[e]ach agency shall appoint as many administrative law judges as are necessary for hearings required under the APA." 5 U.S.C. § 3105. Specifically, the APA provides that in rule-makings or adjudications required by statute to be determined on the record after opportunity for agency hearing, the agency, one or more members of the body which comprises the agency, or one or more Administrative Law Judges appointed under 5 U. S.C. § 3105 shall preside at the taking of evidence.[6]

ALJs serve as independent impartial triers of fact "insulated from political interference" when presiding over formal proceedings requiring a decision on the record after the opportunity for a hearing. *See Butz v. Economou*, 438 U.S. 478, 513 (1978). ALJs "exercise significant authority pursuant to the laws of the United States", *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), to issue subpoenas, regulate dis-

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[6] Under 5 U.S.C. § 556, the agency head or one or more members of the agency may preside over agency adjudications. These alternatives are rarely used.

covery, conduct pre-hearing conferences, rule on procedural and dispositive motions, administer oaths, receive offers of proof and relevant evidence, regulate the course of the hearing, review briefs, and issue decisions and orders based on findings of fact and conclusions of law. *See generally* 5 U.S.C. §§ 556, 557 (2006); *see also Federal Maritime Commission v. S.C. State Ports Authority*, 535 U.S. 743, 757-759 (2002) (describing the similarities between FMC proceedings and civil litigation).

Whether this Court determines that SEC ALJs are inferior officers or employees, the plain wording of the APA and its legislative history shows the intent of Congress to provide for administrative adjudication procedures that are open to the public and conducted "on the record" by fair and impartial Administrative Law Judges.

## II. CURRENT ALJ SELECTION, APPOINTMENT, PROTECTIONS, AND INDEPENDENCE UNDER THE APA

The Civil Service Reform Act of 1978 (CSRA), Pub.L. No. 95–454, 92 Stat. 1111 (1978), abolished the Civil Service Commission and distributed its functions primarily among three new agencies: the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), and the Federal Labor Relations Authority (FLRA). By statute, OPM has the duty to administer the ALJ examination and establish a list of eligible candidates from which agencies make competitive service selections of ALJs.

ALJ candidates must demonstrate an active law license in good standing, at least seven years of litigation or other qualifying experience, and achieve a

sufficient score on a multi-part competitive examination. U.S. Office of Personnel Management, Qualification Standard for Administrative Law Judge Position, *available at* https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/.

The ALJ examination measures thirteen judicial competencies necessary for successful ALJ performance.[7] The examination currently includes a timed situational judgment test, a timed writing sample, an untimed experience assessment, a four-hour written examination, a structured interview, and a logic-based measurement test. Appendix C; *see also* Erin Masson Wirth, *Becoming a United States Administrative Law Judge,* Careers in Administrative Law and Regulatory Practice, ABA Section of Administrative Law and Regulatory Practice (2017), *available at* https://www.americanbar.org/content/dam/aba/administrative/administrative_law/2017_Careers_Book_Wirth_Chapter_updated.authcheckdam.pdf.

Based on experience, examination scores, and veteran preference points, ALJ candidates who meet the minimum qualification standards and pass the examination are assigned a score and are ranked on a register of eligible candidates. Agencies needing to appoint ALJs select from an OPM certification that contains at least the three highest ranking candidates

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[7] A competency is a measurable pattern of knowledge, skills, abilities, behaviors, and other characteristics that a candidate needs to perform work roles or occupational functions successfully. OPM's ALJ competencies currently include decision making, interpersonal skills, judicial analysis, judicial decisiveness, judicial management, judicial temperament, litigation and courtroom competence, oral communication, problem solving, professionalism, reasoning, self-management, and writing.

for that geographical location. Agencies may also hire lateral transfers of current incumbent ALJs at other federal agencies. A number of agencies borrow ALJs from other agencies through the OPM loan program rather than hiring their own ALJs. 5 C.F.R. § 930.208.

Once appointed, ALJs have statutory protections and independence from political pressure or influence by the agency. To protect administrative law judges from improper agency influence, Congress provided in the APA that disciplinary or removal actions "may be taken against an administrative law judge appointed under [5 U.S.C. § 3105] by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a) and (b).

When the APA requires a hearing to be conducted on the record and the agency head chooses not to preside at the reception of the evidence, the ALJ presides at the reception of evidence and issues an initial decision, unless the agency requires that the entire record be certified to it for decision. 5 U.S.C. § 557(a) and (b).

The APA provides that ALJs "shall make the recommended decision or initial decision required" and "may not (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate, or (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d)(1)-(2). "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related

case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings." 5 U.S.C. § 554(d)(2). However, the head of an agency retains authority over agency policy through the administrative appeals process.

While there are variations, ordinarily when an ALJ makes an initial decision, that decision may become the decision of the agency unless a party appeals the ALJ's initial decision or the agency decides to review the initial decision. "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b).

Agencies may modify or reverse ALJ decisions as to both fact and law, but when reviewing the initial decision, must give deference to credibility determinations, particularly those based on witness demeanor, and consider the ALJ's initial decision. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 806-07, n. 50 and 51 (2013) (citations omitted). Generally, an administrative adjudication only becomes a final agency action if approved on appeal by the agency head or agency designated appellate authority, or if there is no appeal from an initial decision.

## III. THE REMEDIAL RAMIFICATIONS IF THE SEC ALJ APPOINTMENT PROCESS IS FOUND TO BE UNCONSTITUTIONAL

### A. Final Judgments

This Court has held that even when an adjudicator lacks the power to decide a case, once a judgment becomes final, it cannot be attacked collaterally absent extraordinary circumstances that outweigh finality.

*Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 154 (2009). *See also Durfee v. Duke*, 375 U.S. 106, 114-15 (1963); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (in civil cases there is little opportunity for collateral attack on final judgments). Otherwise, "the rules of res judicata principles would be entirely short circuited." *Travelers Indem. Co.*, 557 U.S. at 137 (citations omitted). Accordingly, if the Court holds that SEC ALJs are inferior officers who were not constitutionally appointed, final SEC judgments should be left intact.

### B. Pending Cases Not Yet Final

Where an appointment of an "inferior officer" has been found insufficient in the past, *see e.g., Ryder*, 515 U.S. at 180-188, this Court has found that a subsequent proper appointment or ratification is sufficient for the inferior officer to take future actions. *Edmond v. U.S.*, 520 U.S. 651, 666 (1997).

For administrative determinations that have been properly challenged based on an alleged unconstitutional appointment and are not yet final, the Court should provide clear guidance regarding the ratification or appointment of Administrative Law Judges and the remand for review or rehearing of pending cases by properly appointed ALJs. *See e.g., American Constr. Co. v. Jacksonville, T. & K. W.R. Co.*, 148 U.S. 372, 387 (1893); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960); *Ryder v. United States*, 515 U.S. 177, 180-88 (1995); *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 73-74 (2003).

It is anticipated that this decision will impact the more than 1930 current ALJs who are estimated to have well over one million pending cases.[8] A lengthy or complicated process to review or rehear those cases could result in significant delays and increased backlogs.

### C. Prospective Cases

For prospective administrative adjudications, FALJC is concerned about the extensive number of administrative cases affecting the public.[9] *See* Appendix D.

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[8] Caseload statistics for current administrative adjudication are not readily available. Administrative Conference of the United States (ACUS) and Stanford Law School compiled some statistics regarding caseloads in administrative adjudication for FY 2013. These statistics did not include all agencies, included cases heard by ALJs as well as other administrative adjudicators, and included cases on appeal within the agency beyond the hearing level. Appendix D compiles the verified hearing level caseload statistics for cases handled by ALJs. For the 18 agencies for which ALJ statistics were available, there were over a million pending cases. Given increasing caseloads and the number of agencies not included, the number of currently pending cases is significantly higher. *See* Appendix D.

[9] A variety of vexing questions remain. If an ALJ was unconstitutionally appointed, but transfers to a different agency and is constitutionally appointed, does the subsequent appointment cure the initial unconstitutional appointment? If an ALJ was constitutionally appointed, but transfers to a different agency, must the ALJ's appointment be ratified by the head of the new agency, notwithstanding prior proper appointment? What if the "Heads of Departments" or a majority thereof, decline to ratify an appointment or reappoint an incumbent ALJ or ALJs for political or other reasons? Do ALJs retain their statutory "only for good cause" protection under the APA in the event the head of an agency constructively removes an ALJ by declining to reappoint them or ratify their prior appointment? Who is responsible for

Congress created many independent agencies, diverse in structure, function, and design, with various indicia of independence, including differing combinations of independent litigation and adjudication authority and for-cause removal restrictions. *See PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75 at (D.C. Cir. 2018) (summarizing Court precedent and academic scholarship affirming Congressional design of agencies with various indicia of independence that do not infringe on the President's constitutional duty to ensure that the laws are faithfully executed).

The grant of certiorari is limited to the question of whether the SEC judges are required to be appointed as inferior officers of the United States.[10] Such a

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appointing or ratifying ALJs who are loaned to hear cases for other agencies?

[10] The Court did not grant an expansion of the issue in this case. However if the Court considers the ALJ "for-cause" protection as incident to the Appointments Clause issue, an ALJs' sole adjudicatory function should permit Congress constitutionally under the APA to provide "only for good cause" tenure protection to enhance fairness and procedural due process and to ensure sufficient decisional independence and impartiality, free from agency or Executive pressure that would exist with at-will removal authority. The intent of Congress to provide sufficient ALJ decisional independence and impartiality for the benefit of the public and due process under the APA should be upheld. *See* Jerome Nelson, *Administrative Law Judges' Removal "Only For Cause": Is That Administrative Procedure Act Protection Now Unconstitutional?*, 63 Admin. L. Rev. 401, 416-18 (2011) (concluding that "there is no reason to bring the ALJ's more limited and purely adjudicatory roles closer to presidential removal" and "[s]uch a radical outcome, with a serious adverse impact on the fairness of the administrative adjudicatory system, is not required by [*Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 493 (2010).]"); *see also* Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 Notre Dame l. Rev. 1349, 1397-99 (2012) (arguing that the particular

determination would substantially impact the administrative adjudication system which relies on over 1900 ALJs to provide due process for the benefit of the public. FALJC suggests that the Court consider the potential impact of this matter on the administrative adjudication system and the benefit the public receives from independent adjudicators in on-the-record proceedings.

Scholars in administrative law have identified concerns and proposed various changes to the administrative adjudication system. However, the intent of Congress through the APA to provide an impartial and independent ALJ oversight check on the limits on executive agency action should be upheld and to the extent any improvements are needed, action to modify the APA should be taken by Congress. *See e.g.*, Barnett, 66 Vand. L. Rev. at 802.[11]

FALJC encourages the Court to insure that ratification of incumbent ALJs is sufficient under the Appointments Clause to permit ALJs to adjudicate existing and future disputes consistent with the Constitution to ensure stability and continuity within administrative adjudication.

## CONCLUSION

The resolution of this proceeding should preserve ALJ decisional independence created by Congress in the APA, provide clear guidelines regarding the

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combination of tenure protections for ALJs does not impermissibly interfere with the President's supervisory power).

[11] Congress has considered changes to the current system. H.R. 5177, 106th Cong. 2d Sess. (2000) was introduced in the House of Representatives in 2000. https://www.congress.gov/bill/106th-congress/house-bill/5177/text.

ratification or appointment of ALJs and the review of pending cases by properly-appointed ALJs, and insure that ratification of incumbent ALJs is sufficient under the Appointments Clause to permit ALJs to adjudicate existing and future disputes consistent with the Constitution.

Respectfully submitted,

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February 26, 2018

# APPENDIX

# APPENDIX A

Federal Administrative Law Judges by agency and level (EHRI-SDM as of March 2017)*

| AGENCY | AL-3 | AL-2 | AL-1 | Total |
|---|---|---|---|---|
| Commodity Futures Trading Commission | 0 | 0 | 0 | 0 |
| Consumer Financial Protection Bureau | 1 | 0 | 0 | 1 |
| Department of Agriculture | 2 | 1 | 0 | 3 |
| Department of Education | 2 | 0 | 0 | 2 |
| Department of Health and Human Services/DAB | 5 | 0 | 0 | 5 |
| Department of Health and Human Services/FDA | 0 | 0 | 0 | 0 |
| Department of Health and Human Services/OMHA | 94 | 6 | 1 | 101 |
| Department of Homeland Security/United States Coast Guard | 5 | 1 | 0 | 6 |
| Department of Housing and Urban Development | 2 | 0 | 0 | 2 |
| Department of the Interior | 8 | 1 | 0 | 9 |
| Department of Justice/Drug Enforcement Administration Review | 2 | 0 | 0 | 2 |
| Department of Labor | 32 | 8 | 1 | 41 |
| Department of Transportation/Office of the Secretary | 2 | 1 | 0 | 3 |
| Environmental Protection Agency | 2 | 1 | 0 | 3 |

| | | | | |
|---|---|---|---|---|
| Federal Communications Commission | 1 | 0 | 0 | 1 |
| Federal Energy Regulatory Commission | 12 | 0 | 1 | 13 |
| Federal Labor Relations Authority | 1 | 1 | 0 | 2 |
| Federal Maritime Commission | 2 | 0 | 0 | 2 |
| Federal Mine Safety and Health Review Commission | 14 | 0 | 1 | 15 |
| Federal Trade Commission | 1 | 0 | 0 | 1 |
| International Trade Commission | 6 | 0 | 0 | 6 |
| Merit Systems Protection Board | 0 | 0 | 0 | 0 |
| National Labor Relations Board | 30 | 3 | 1 | 34 |
| National Transportation Safety Board Commission | 3 | 0 | 0 | 3 |
| Office of Financial Institution Adjudication | 2 | 0 | 0 | 2 |
| Securities and Exchange Commission | 4 | 1 | 0 | 5 |
| Small Business Administration | 0 | 0 | 0 | 0 |
| Social Security Administration | 1,642 | 13 | 0 | 1,655 |
| United States Postal Service | 1 | 0 | 0 | 1 |
| TOTAL | 1,888 | 38 | 5 | 1,931 |

* From: https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

## APPENDIX B

## THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

P.O. Box 1772 • Washington, DC 20013 •
www.faljc.org

## MISSION OF THE

## FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

**Founded February 6, 1947**

The purposes of the Conference are to further the public interest by improving the administrative process; to foster faithful, efficient, and effective performance of the functions assigned to Administrative Law Judges under the various statutes governing Federal administrative proceedings; to advance the professional standing, education and welfare of the Administrative Law Judges employed by the Government of the United States; to defend the independence of federal Administrative Law Judges; to defend the protections afforded Administrative Law Judges by the Administrative Procedure Act; and to encourage the cordial and friendly relations among the members of the Conference and with the judiciary, government agencies, and public and private organizations concerned with the administrative process.

## LEADERSHIP

The Officers and Executive Committee of FALJC includes Administrative Law Judges from the following agencies:

| | | |
|---|---|---|
| CFPB | FLRA | OMHA-HHS |
| DEA | FMC | OSHRC |
| DOI | FMSHRC | SEC* |
| DOL | HHS-DAB | SSA |
| DOT | HUD | USCG |
| EPA | ITC | USDA |
| FCC | NLRB | USPS |
| FERC | NTSB | |

* FALJC members employed by the SEC did not participate in discussion about or preparation of this brief.

## APPENDIX C

**Job Title:** Administrative Law Judge Examination*

**Job Announcement Number:** ALJ2017-847661

**HOW YOU WILL BE EVALUATED**

**Basis for Rating:**

After you submit a complete online Application Package and you have cleared the preliminary qualifications screening, you will receive information and an internet link via email announcing the upcoming time period in which you must complete the Situational Judgment Test (SJT), Writing Sample, and Experience Assessment online. If you do not complete the SJT, Writing Sample, and Experience Assessment in the required time period, a Notice of Results (NOR) will be issued to you indicating a rating of "ineligible" and no further action will be taken on your application. See the "Appeals Process" section below.

**Online Component: Situational Judgment Test (SJT), Writing Sample, and Experience Assessment**

**Section 1: SJT** - The SJT presents applicants with a set of work-related problems or critical situations and asks applicants to indicate which of the multiple-choice response options they would most likely and least likely take to handle the situations. The SJT is administered online, is timed, and involves text-based scenarios as well as video-based scenarios with closed captioning. Applicants may take as long as they wish to review the instructions but are given 75 minutes to respond to the SJT questions.

**Section 2: Writing Sample** - The Writing Sample is an exercise in which applicants write a response to a pre-determined topic. Applicants type their writing sample responses online and the exercise is timed.

Applicants may take as long as they wish to review the instructions but are given 35 minutes to prepare a response to the question.

**Section 3: Experience Assessment** - The Experience Assessment includes multiple-choice and open-ended questions about work experience that is related to ALJ positions.

Applicants select a multiple-choice response and write a narrative response, as appropriate, to indicate and document their experience associated with the targeted competency. The Experience Assessment is not timed.

Applicants who are invited to participate in the SJT, Writing Sample, and Experience Assessment will receive an advance email with specific instructions for completing these assessments and details about computer system requirements. After you have submitted your responses to the online assessments (i.e., SJT, Writing Sample, and Experience Assessment), you will not be allowed to make changes to your submission.

If the score for your performance on the SJT, Writing Sample, and Experience Assessment is within the range for the higher-scored sub-group of all the eligible applicants, you will be invited to participate in the Written Demonstration, Logic-Based Measurement Test, and Structured Interview. You will be notified via email regarding when and where to report for the Written Demonstration, Logic-Based Measurement Test, and for the Structured Interview.

If the score for your performance on the SJT, Writing Sample, and Experience Assessment is not within the range for the higher-scored sub-group of all the eligible applicants, you will be notified via email that you will no longer be considered for this current ALJ

Job Opportunity Announcement. You will not be invited to participate in the Written Demonstration, Logic-Based Measurement Test, and the Structured Interview.

**NOTE:** In determining the SJT, Writing Sample, and Experience Assessment score, veterans' preference points will be applied to the scores of applicants who are entitled to such points and have submitted the required documentation. For applicants who successfully complete the remaining components of the examination, preference points will then be withdrawn from the SJT, Writing Sample, and Experience Assessment score, so that veterans' preference points, when applied to the applicant's final score for the entire examination, will be counted only once.

**Proctored Component: Written Demonstration (WD) and Logic-Based Measurement Test (LBMT).** If you are invited to participate in the WD and LBMT, this component of the examination will be administered to you in a proctored environment in two separate sessions on one day, unless informed otherwise.

**Section 1: WD** - The purpose of the WD is to evaluate an applicant's ability to prepare a clear, concise, and well-reasoned legal decision of the type that one might be expected to write if employed as an ALJ. The WD is scheduled for 5 hours to allow time for instructions and other administrative processes, but actual testing time is 4 hours. The WD is conducted in a proctored environment using a laptop computer provided by OPM, and will be administered in one location in the Washington, DC area.

If you do not receive the required minimum score on the WD, you will not receive a final numerical rating and will not be placed on the ALJ register.

**Section 2: LBMT** - The LBMT presents applicants with a set of scenarios and multiple- choice response options. Only one response option in each scenario is logically accurate, while the remaining options are logically inaccurate. Applicants are asked to indicate which one response option is logically accurate. OPM will provide writing utensils and a scantron form to document your answers. The LBMT is conducted in a proctored environment and will be scheduled for 2½ hours to allow time for instructions, but actual testing time is approximately 2 hours. The LBMT will be administered in one location in the Washington, DC area.

You must complete the WD and LBMT before participating in the Structured Interview.

**In-person Component: Structured Interview (SI).** If you are invited to participate in the SI, this part of the examination will be administered in an in-person panel interview environment.

**SI** - The objective of the SI is to evaluate an applicant's responses to competency-based questions related to being an ALJ. A panel will conduct the interview and evaluate the responses provided by the applicant. The interview will last approximately one hour, but you will need to arrive early to allow time for instructions. The SI will be administered in one location in the Washington, DC area.

If you do not receive the required minimum score on the SI, you will not receive a final numerical rating and will not be placed on the ALJ register.

**NOTES:**

- **Applicant Expenses:** Travel, lodging and other expenses in association with the ALJ examination are the responsibility of the applicant.
- **Reasonable Accommodations**
  - **ALJ Examination Components:** Refer to the Assessment Questionnaire. All requests must be approved prior to the start of the particular examination component.
  - **In-person Component:** Electronic timing devices (i.e., timer on cell phone, etc.) must be pre-approved. OPM reserves the right to inspect the electronic timing device immediately before the component begins and immediately after the component ends or to provide the applicant with an alternative timing device.
- **Electronic Devices:** Use of electronic devices (e.g. cell phones, watches, etc.), connected to the internet is prohibited while participating in the ALJ examination.
- **Confidentiality Agreement:** If you sign a confidentiality agreement for an examination component, you are bound by the conditions of the agreement and are prohibited from discussing, publishing, or sharing the test questions or test materials with others, regardless of whether or not the others are applicants for the ALJ examination. Violating the terms of the agreement will disqualify you from further participation in the ALJ examination process or placement on the ALJ register of eligibles.

- **Inclement Weather During Proctored and In-Person Components:** Information regarding the inclement weather policy for the Proctored Component (WD/LBMT) and In-Person Component (SI) of the ALJ examination is posted on the OPM ALJ webpage at: https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=Inclement-Weather. Applicants must follow the instructions described in the notice.

**Final Numerical Rating:** Applicants who complete all portions of the assessment process and achieve the minimum required (passing) score on both the WD and SI will be issued a final numerical rating on a scale of **1 – 100**. The rating will be based on the scores assigned for the SJT/Writing Sample/Experience Assessment, the WD/LBMT, and the SI components of the examination with a maximum possible total score of **100**, excluding veterans' preference. If you do not claim veterans' preference, this earned rating will be your final numerical rating. If you are eligible for veterans' preference (other than on the basis of sole survivorship, as described below) and have submitted the required documentation, 5 or 10 points, as appropriate, will be added to your total earned rating to determine your final numerical rating.

Your official Notice of Results and a notice describing your appeal rights will be issued after OPM completes the administration of the ALJ examination for the entire group of applicants that participated in the examination. Applicants also can check the ALJ page on OPM's website https://www.opm.gov/services-for-agencies/administrative-law-judges/ for information regarding when examination related notices have been released.

**Appeals Process:**

An ALJ Appeals Panel (Panel) will be convened to adjudicate preliminary qualification appeals before all other ALJ assessment appeals.

All other ALJ assessment appeals (including appeals from ratings indicating the applicant was determined to be 'ineligible' at any stage of the ALJ assessment process, after the preliminary qualifications process) will be adjudicated after all final numerical ratings have been assigned. The Panel will adjudicate such appeals from the following categories of applicants who believe their ratings were assigned in error:

1. An applicant who received a NOR indicating that his/her SJT, Writing Sample (WS), and Experience Assessment (EA) score was not within the range for the higher- scored sub-group of all the eligible applicants and, therefore, did not receive further consideration for this current ALJ Job Opportunity Announcement.
2. An applicant who did not receive a minimum required score on the WD and/or SI, did not receive a final numerical rating, and was not placed on the ALJ register.
3. An applicant who participated in the SJT, WS and EA, the WD/LBMT, and SI components and after further review of his/her bar status does not satisfy the licensure requirement.
4. An applicant who received a NOR with a final numerical rating, for appeal of the entire examination.

The Panel has the authority to **affirm, raise,** or **lower** the rating; change a rating from eligible to ineligible and **remove** an applicant from the register;

or **remand** for further development. An appeal must be filed by email within 30 calendar days from the date of the NOR. We will not accept appeals or clarifying appeals information filed past the 30 calendar day deadline. Appeals are adjudicated based on the record. OPM may obtain confirming or clarifying information from state bar licensing agencies and other official repositories. The decision of the Appeals Panel is final, and exhausts further administrative appeal rights. Additional details regarding the appeal process will be provided after the NORs have been issued to all applicants.

**NOTE:** If you receive a final numerical rating, and your name is placed on the ALJ register, and you appeal your numerical rating, your name will remain on the register, associated with your original score of record while the appeal is being processed. If, however, you are selected for an ALJ position, your name will be removed from the register and your pending appeal will be cancelled.

Questions regarding the situations below are not subject to the ALJ Appeals Panel adjudication process. Instead, such inquiries are handled through separate administrative review procedures and must be sent to aljapplication@opm.gov.

1. Applicants who did not attend or complete the WD/LBMT or SI Components.
2. Applicants who voluntarily withdrew their application from consideration from the ALJ examination.
3. Denial of a reasonable accommodations request.
4. Veterans' preference adjudication.

5. Applicants who received a NOR indicating suspension from the ALJ register for failure to continuously possess a license to practice law while on the ALJ competitive register and during the selection process or any appeal review.

**Retaking the ALJ Examination:** You may retake the ALJ examination when the examination is open to the receipt of new applications if:

- You received a NOR indicating any "ineligible" rating at any stage of the ALJ examination assessment process
- You received a final numerical rating before June 2017.

In any of the above situations, you are required to retake all parts of the examination. Please note that once you start retaking the examination, in order to receive a new final numerical rating and remain on the register, you must successfully complete all components of the examination. Your most recent rating will become your new rating of record. This new rating can be higher than, the same as, or lower than the score you received previously, or it can be an ineligible rating.

**NOTE:** If you reapply for the examination while you have an appeal pending, the reapplication will automatically terminate the appeal. If you have already reapplied for a new iteration of the examination, OPM will not process any subsequent attempt to appeal from an earlier NOR.

If you are a 10-point veterans' preference eligible, you have the right to reopen the ALJ Job Opportunity Announcement at any time after it closes, pursuant to 5 CFR 332.311, to participate in a quarterly

examination. You have this right even if you have received a final numerical rating and your name has been placed on the register. You will, however, be bound by the result of retaking the examination. In other words, once you start retaking the examination, in order to receive a new final numerical rating and remain on the register, you must successfully complete all components of the examination. Your most recent rating will become your new rating of record. This new rating can be higher than, the same as, or lower than the score you received previously, or it can be an ineligible rating.

**Receiving Employment Consideration:**

If you receive a NOR with a final numerical rating, your name will be placed on the ALJ register. The ALJ register is a list of candidates who are eligible for selection and is used to make referrals to agencies for employment consideration when they have entry level ALJ vacancies to fill. Names are referred in descending rank order, including veterans' preference, based on the duty location of the position(s) to be filled and the geographical preference of candidates. It is the responsibility of the hiring agency to make selections from the list of candidates referred for employment consideration from among the highest three available names, taking into consideration veterans' preference and other civil service rules. If you are appointed to an ALJ position, you will be removed from the register and will no longer receive consideration.

By submitting an ALJ application, you are expressing your interest in and availability for ALJ employment.

- Declination of Job Offers: If you decline two (2) job offers you will be suspended from the ALJ register for a period of one (1) year or until the

register is terminated, whichever comes first. If after one (1) year you wish to have your name returned to the ALJ register, you must submit your request in writing to the ALJ email address at: aljapplication@opm.gov. Your request to end your suspension and have your name returned to the register will be accepted as long as the register on which you were placed has not been terminated, and you meet the licensure requirement.

- Non-Availability or Declination of Employment Consideration for Any Reason: As stated in the Geographic Availability section (see below), *"If after selecting your geographical location(s) you decline consideration for a geographical location(s) for which you indicated availability, you will be removed from further consideration for that location(s). You will not be able to reinstate a location from which you have been removed until the next ALJ Job Opportunity Announcement open period."* If you decline to be considered for any location(s) for which an agency is, at that time, seeking to consider you, you will be removed from further consideration for the location(s). Again, you will not be able to reinstate the location(s) until the next ALJ Job Opportunity Announcement open period.

If you become unavailable for consideration for a period of time, you should request to have your name suspended due to unavailability from the register. Such requests for suspension, as well as requests to end the suspension and have your name restored to the register, must be submitted to aljapplication@opm.gov. Requests to end the suspension and have your name restored to the register will be accepted as

long as the register on which you were placed has not been terminated, and you meet the licensure requirement. OPM may extend the expiration date of the register at any time. Prior to the expiration date, applicants on the register will be notified regarding their status and any action impacting their eligibility.

If your name is referred for consideration from the register, and you fail to respond to an inquiry from the prospective employing agency, you will be considered unavailable for appointment, and your name will be suspended from the ALJ register due to unavailability until you request to have your name restored to the register as described in the preceding paragraph.

* OPM 2017 guidance.

# APPENDIX D

## Adjudication Research
## Caseload Statistics, FY 2013
## Verified Administrative Law Judge Cases*

## Joint project of the Administrative Conference of the United States and Stanford Law School

| Agency | Office | Total # Cases Filed/ Opened FY2013 | Total # Cases Decided/ Closed FY2013 | Total # Cases Pending (End FY2013) |
|---|---|---|---|---|
| Social Security Administration | Office of the Chief Administrative Law Judge | 826,635 | 793,580 | 847,984 |
| Department of Health and Human Services | Office of Medicare Hearings and Appeals | 384,151 | 79,377 | 240,116 |
| Federal Mine Safety and Health Review Commission | Office of Administrative Law Judges | 6,898 | 12,262 | 7,612 |
| Department of Labor | Office of Administrative Law Judges (OALJ) | 4,269 | 3,534 | 5,004 |
| Department of Labor | Board of Alien Labor Certification Appeals (BALCA) | 3,621 | 2,215 | 5,222 |

| | | | | |
|---|---|---|---|---|
| Occupational Safety & Health Review Commission | Office of the Chief Administrative Law Judge | 2,215 | 2,460 | 909 |
| National Labor Relations Board | Division of Judges | 1,292 | 707 | 352 |
| Department of Labor | Office of Administrative Law Judges | 556 | 519 | 552 |
| National Transportation Safety Board | Office of Administrative Law Judges | 311 | 308 | 3 |
| Federal Labor Relations Authority | Office of Administrative Law Judges | 271 | 266 | 122 |
| Environmental Protection Agency | Office of Administrative Law Judges | 46 | 25 | 24 |
| United States International Trade Commission | Office of the Administrative Law Judges | 39 | 62 | 41 |
| Department of Commerce | HUD Office of Administrative Law Judges | 10 | 3 | 7 |
| Federal Maritime Commission | Office of Administrative Law Judges | 9 | 14 | 9 |
| Department of the Treasury | Office of Administrative Law Judges | 5 | 2 | 3 |

| | | | | |
|---|---|---|---|---|
| Federal Trade Commission | Office of Administrative Law Judges | 5 | 5 | 2 |
| Department of Commerce | United States Coast Guard Office of Administrative Law Judges | 3 | 1 | 2 |
| Consumer Financial Protection Bureau | Office of Administrative Adjudication | 1 | 0 | 1 |
| TOTALS | | 1,230,337 | 895,340 | 1,107,965 |

* Caseload statistics, edited to include only hearing level cases from Administrative Law Judge offices with verified numbers. Original data available at: https://acus.law.stanford.edu/reports/caseload-statistics.

These are the most recent and most accurate statistics publicly available. It is noted that statistics from only 18 of the more than 30 agencies using ALJs are included. In addition, caseloads are increasing. For example, at HHS/OMHA, as of June 2, 2017, there were 607,402 pending ALJ cases and "[o]n its current course, the backlog is projected to grow to 950,520 by the end of fiscal year 2021." *AHA v. Price*, 867 F.3d 160, 163 (D.C. Cir. 2017).

Given increasing caseloads and the number of agencies not included, the number of currently pending cases is significantly higher.